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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 218.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and ILLINOIS COMMERCE COMMISSION.

Appeal from the Supreme Court of the State of Illinois.

BRIEF FOR APPELLANT.

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INDEX.

Subject Index.

	Page
The opinions below	1
Jurisdiction on appeal	2
Statement of the case	3
Specification of Errors intended to be urged	17
Summary of argument	22
Argument	23
a. The applicable Illinois statutes and decisions under which this case was considered by the Illinois Commerce Commission and by the Supreme Court of the State of Illinois	23
b. The opinion and decision of the Supreme Court of Illinois	27
c. Congress has taken charge of the field, viz., the matter of cabooses, and, therefore, a state cannot legislate in that field, even though the effect upon interstate commerce is indirect and even though Congress has not legislated as to the particular matters involved	29
d. The order does directly burden and affect interstate commerce and does have extraterritorial effect, and it is, therefore, invalid even though Congress has not taken charge of the field	44
e. The order deprives appellant of its property without due process of law	58
f. Conclusion and prayer for reversal of the order and judgment of the Supreme Court of the State of Illinois	61

Table of Cases Cited.

Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314 30
A. T. & S. F. Ry. v. LaPrade, 2 Fed. Supp. 855...41, 52, 57
Atlantic Coast Line R. R. Co. v. Georgia, 234 U. S. 280. 54
Atlantic Coast Line v. North Car. Corp. Comm., 206 U. S. 1, 51 L. Ed. 933..... 59
Brotherhood of Railroad Trainmen v. E. J. & E. Ry. Co., 374 Ill. 60 .....5, 23
Buck v. Kuykendall, 267 U. S. 307..... 45
California v. Thompson, 313 U. S. 109..... 55
Chesapeake & Ohio Ry. Co. v. P. S. C., 242 U. S. 603, 61 L. Ed. 520 58
C. & W. C. R. Co. v. Varnville F. Co., 237 U. S. 597, 59 L. Ed. 1137 30
C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979 59
C. B. & Q. R. R. Co. v. Commerce Comm., 364 Ill. 213.. 58
C. B. & Q. Ry. v. Wisconsin R. R. Comm., 237 U. S. 220, 59 L. Ed. 926 .....45, 54, 59
C. M. & St. P. R. R. v. Wisconsin, 238 U. S. 491, 59 L. Ed. 1423 59
Chicago & N. W. Ry. v. Ochs, 249 U. S. 416, 63 L. Ed. 679 59
Clover Leaf Butter Co. v. Patterson, 86 L. Ed. 486.... 43
Colorado v. U. S., 271 U. S. 153.....54, 58
C. R. I. & P. R. R. v. Arkansas, 219 U. S. 453..... 54
Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456, 478 39
Duckworth v. Arkansas, 314 U. S. 390..... 55
Eicholz v. Pub. Service Com. of Mo., 306 U. S. 268.... 43
Erie R. Co. v. New York, 233 U. S. 671, 58 L. Ed. 1149 30
Gamble-Robinson Co. v. U. P. R. Co., 262 Ill. 400..... 30
Georgia Power Co. v. Decatur, 281 U. S. 505, 74 L. Ed. 999 58
Great Northern R. R. Co. v. Minnesota, 238 U. S. 340.. 58

Houston v. Moore, 50 L. Ed. 19 30
Illinois Natural Gas Co. v. Central Illinois Public Service Co., 86 L. Ed. 322 43
K. C. Ry. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75 45
Kelly v. Washington, 302 U. S. 1 43
Lake Erie & Western R. R. Co. v. State Public Utilities Comm. of Illinois ex rel. Cameron, 249 U. S. 422 3
Lemke v. Farmers Grain Co., 258 U. S. 50 .....45, 53, 57
Live Oak Water Users' Assn. v. R. R. Comm. of Cal., 269 U. S. 354 3
Minnesota Rate Cases, 230 U. S. 352 45
Miss. R. R. Comm. v. M. & O. R. Co., 244 U. S. 388, 61 L. Ed. 1216 59
Missouri Pacific Railroad Co. v. Norwood, 283 U. S. 249 .....34, 41
Missouri Pacific Railroad Co. v. Porter, 273 U. S. 341, 71 L. Ed. 672 30
Missouri Pac. Ry. Co. v. Kansas, 216 U. S. 262 .....56, 59
Napier v. Atlantic Coast Line, 272 U. S. 605 30
N. Y., N. H. & H. R. R. Co. v. New York, 165 U. S. 628 56
Norfolk & W. Railroad Co. v. P. S. C., 265 U. S. 70, 68 L. Ed. 904 58
Northern Pacific R. Co. v. Washington, 222 U. S. 370, 56 L. Ed. 237 30
Northwestern Bell Telephone Co. v. Nebr. St. Ry. Comm., 297 U. S. 471 43
Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, 70 L. Ed. 482 30
Penn Coal Co. v. Mahon, 260 U. S. 393 58
Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U. S. 613 58
Penn. R. R. Co. v. Public Service Comm., 250 U. S. 566 .....29, 30, 40

People v. Bradford, 372 Ill. 63 ..... 6, 23
People v. Cross, 361 Ill. 405 57
People v. I. C. R. R. Co., 324 Ill. 591 30
Prigg v. Pennsylvania, 10 L. Ed. 1060 30
R. R. Comm. v. Southern Pacific Ry. Co., 264 U. S. 331 ..... 39, 43
Santa Cruz Co. v. Labor Board, 303 U. S. 453, 466, 467 47
Shafer v. Farmers' Grain Co., 268 U. S. 189 ..... 45, 53, 57
Shreveport Rate Cases, 234 U. S. 342 46
South Covington & Cincinnati St. Ry. Co. v. Covington, 235 U. S. 537 ..... 45, 48, 55, 57
Southern Pac. R. R. Co. v. R. R. Commission, 10 F. Supp. 918 ..... 41, 52, 57, 59
Southern R. Co. v. R. R. Comm. of Ind., 236 U. S. 439 ..... 29, 45
Southern R. Co. v. Virginia, 290 U. S. 190 58
Southern R. Co. v. U. S., 222 U. S. 20, 56 L. Ed. 72 ... 30
St. Louis C. R. Co. v. Blumberg, 325 Ill. 387 30
Staley v. I. C. R. R. Co., 268 Ill. 356 30
Staten Island Rapid Transit Co. v. P. S. C., 16 F. (2d) 313 30
State of Washington ex rel. Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510 58
Swift & Co. v. U. S., 196 U. S. 375-398 46
Texas & Pacific R. Co. v. Rigby, 241 U. S. 33, 60 L. Ed. 874 30
U. S. v. Knight, 156 U. S. 1 46
U. S. v. Southern Ry. Co., 222 U. S. 20 45
U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 119 ... 46
W. B. Drilling Co. v. Hall, etc., 11 L. W. 4015 ..... 46, 47
Welch v. N. H., 306 U. S. 79 43
Whitney v. Johnson, 37 F. Supp. 65 55
Wickard, etc., v. Filburn, 11 L. W. 4011 ..... 46, 47
Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194 59

Statutes Cited.

Boiler Inspection Act, 45 U. S. C. A., Sec. 22 et seq. ... 40

Illinois Commerce Commission Act, Sec. 32 (Ill. Rev. Stat. 1941, p. 2503); Sec. 50 (Ill. Rev. Stat. 1941, p. 2508); Sec. 60 (Ill. Rev. Stat. 1941, p. 2512), and Sec. 90 (Ill. Rev. Stat. 1941, p. 2524) 24, 26

Interstate Commerce Act, Sec. 1, pars. 10 to 17, incl., and 21, 49 U. S. C. A., par. 1 (10-17, 21) 35, 38

Interstate Commerce Act, U. S. C. A., Sup., Title 49, Section 1, par. 3, p. 6 42

Interstate Commerce Act, U. S. C. A., Title 49, Section 1, par. 10, p. 101 35

Interstate Commerce Act, 49 U. S. C. A. 26 39

Interstate Commerce Act, U. S. C. A., Title 49, Section 11 of Sec. 1, p. 102 35

Interstate Commerce Act, U. S. C. A., Title 49, Par. 12 of Sec. 1, p. 109 35

Interstate Commerce Act, U. S. C. A., Title 49, Par. 13 of Sec. 1, p. 115 36

Interstate Commerce Act, U. S. C A., Title 49, Par. 14 of Sec. 1, p. 115 36

Interstate Commerce Act, U. S. C. A., Title 49, Par. 15 of Sec. 1, p. 116 36

Interstate Commerce Act, U. S. C. A., Title 49, Par. 21 of Sec. 1, p. 132 38

Interstate Commerce Act, U. S. C. A., Title 49, Par. 16 of Sec. 1, p. 119 37

Interstate Commerce Act, U. S. C. A., Title 49, Par. 17 of Sec. 1, p. 120 38

Railway Labor Act of June 21, 1934, U. S. C. A., Vol. 45, Sup., p. 236, U. S. C. A., Sec. 151a, Supp., p. 245 ..... 31, 32, 33

Safety Appliance Act, 45 U. S. C. A., Sec. 1 et seq. ... 40

Transportation Act of 1920, Sec. 439 39

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Appeal from the Supreme Court of the State of Illinois.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion, findings and order of the Illinois Commerce Commission in this case appear in the printed record (R. 1 to 13), as well as the dissenting opinion of Commissioner Olson (R. 13 to 15).

The order and judgment of the Circuit Court of St. Clair County, Illinois, reversing the order of the Commission on the ground that that portion of the order of the Commission requiring cabooses to be attached to trains moving

between the States of Illinois and Missouri over the Eads Bridge and the Merchants Bridge was an interference with interstate commerce and beyond the jurisdiction of the Illinois Commerce Commission, likewise appears in the record (R. 203).

The opinion of the Supreme Court of the State of Illinois is reported in 379 Ill. 403, and also in 41 N. E. (2d) 481; it also appears in the record (pp. 235 to 249).

The order of the Supreme Court of Illinois of May 12, 1942, denying without opinion appellant's petition for a rehearing and thereby making the opinion final is likewise in the record (R. 266).

JURISDICTION.

The opinion of the Supreme Court of Illinois was filed on March 16, 1942 (R. 235). Petition for rehearing was denied by the Supreme Court of Illinois, thereby making its opinion final, on May 12, 1942 (R. 266). Appeal to this Court was applied for and granted by the Chief Justice of the Supreme Court of the State of Illinois on June 11, 1942 (R. 281), and the transcript of record was filed in the office of the clerk of this court on July 10, 1942 (R. 290). Briefs were filed by both parties on the question of the jurisdiction of this Court on appeal. Appellee also filed a brief in support of its motion to dismiss or affirm and appellant filed a reply brief in opposition thereto. This Court on October 12, 1942, noted probable jurisdiction of this appeal.

The jurisdiction of this Court on appeal is invoked under Sec. 237 (28 U. S. C. A. 344) and Secs. 861a and 861b of the United States Code (28 U. S. C. A. Supp., pp. 51-52), on the ground that there was drawn in question in this case the validity of a statute of a state on the ground that it is repugnant to the Constitution and laws of the United States, and the decision in the Supreme Court of Illinois was in favor of its validity; and permitting direct appeal to this Court under such circumstances.

This Court has held that an order of the State Commission, being legislative in its nature and made by an instrumentality of the state, is a state law within the meaning of the Constitution of the United States and the laws thereof regulating the jurisdiction of this Court on appeal. *L. E. & W. R. R. Co. v. State Public Utilities Comm. of Illinois ex rel.*, 249 U. S. 422, l. c. 424, and cases cited therein; *Live Oak Water Users Assn. v. R. R. Comm. of Cal.*, 269 U. S. 354.

STATEMENT OF THE CASE.

On March 4, 1938, appellee, Brotherhood of Railroad Trainmen, by its Chairman and State Legislative Representative, filed with appellee, Illinois Commerce Commission, its petition, alleging that appellant here was a public utility, subject to the provisions of the Act of the State of Illinois providing for the regulation of public utilities; that appellant had failed to provide caboose cars for switchmen in the territory in, around and about East St. Louis, Illinois, and as a result thereof switchmen in the performance of their duties on transfer runs were necessarily required either to ride on the drawbar, in between freight cars, or on the top of, or on the side of freight cars, where numerous reduced vertical and horizontal clearances prevail, thus endangering the life, health and safety of the aforesaid switchmen of transfer cars and of other employes of appellant and of the public within the State of Illinois (R. 16). The petition prayed that appellant be required to answer the charges, and that the Illinois Commerce Commission would make such order in the premises as might seem meet.

Appellant answered this petition, denying the allegations thereof, expressly denying that the Commission had any power, right or authority to enter any order in regard to

the subject matter of the complaint so far as any movements in interstate commerce were concerned, and expressly averring that so far as interstate movements of trains or cuts of cars were concerned, the Commission had no power, jurisdiction or authority to enter any order requiring cabooses upon interstate runs between the State of Illinois and the State of Missouri; and expressly raised the question of the jurisdiction of the Commission so far as any interstate runs or movements were concerned (R. 17). As detailed in our printed statement as to jurisdiction, all other questions raised herein were properly raised before the Commission and passed on by it and by the Supreme Court of Illinois, adversely to appellants' contentions there and here.

On February 1, 1940, the Illinois Commerce Commission entered its findings and order in this cause (R. 1 et seq.). By said order, after extensive findings as to the need of caboose cars, the Commision found by its Finding 34 (R. 11), that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer delivery and industrial runs, twenty in number, between certain of its yards located in the State of Illinois; and likewise, by its Finding 35 (R. 12), found that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer delivery runs in the State of Illinois on all runs over the Eads and Merchants Bridges between the States of Illinois and Missouri. After making such findings, the Commission ordered (R. 12) that appellant be required and directed to furnish, maintain and operate caboose cars on its transfer, delivery and industrial runs, more specifically set forth in Finding 34 of the order, within sixty days from the date of the service of the order, and likewise that appellant be required and directed to furnish, maintain and operate caboose cars on its transfer and delivery runs, more specifically set forth in Finding 35

of the order, within thirty days after the date of the service of the order (R. 12).

The Commission also by its order (R. 13) expressly denied the motion of appellant to dismiss the proceedings for want of jurisdiction.

Of the five members of the Commission, three voted in favor of the findings and order of the Commission, and one Commissioner dissented as to the bridge runs covered by Finding 35 on the ground that the part of the order of the Commission based on Finding 35 was an attempt improperly and unlawfully to regulate interstate commerce and therefore beyond the jurisdiction of the Commission (R. 13).

Appellant, complying with the statutory requirements, filed an application for rehearing before the Commission, which application was denied. Appellant then appealed to the Circuit Court of St. Clair County, Illinois, where the cause, as provided by the Illinois statutes, was heard on the record made before the Commission. On July 26, 1940, the Circuit Court of St. Clair County, Illinois, without opinion and passing only upon that portion of the order requiring caboose cars on runs across the bridges, found that that part of the order of the Commission requiring cabooses to be attached to runs moving between the States of Illinois and Missouri over the Eads and Merchants Bridges was an interference with interstate commerce and was beyond the jurisdiction of the Illinois Commerce Commission. The Circuit Court further found that under the decision rendered by the Supreme Court of Illinois in the case of *Brotherhood of Railroad Trainmen v. E. J. & E. Ry. Co.*, 374 Ill. 60, the power of the Circuit Court was limited to either affirming in its entirety or setting aside in its entirety the order of the Commission. The Circuit Court, under the last-mentioned decision, therefore, having found that the order was bad in one respect, did not pass upon

any other questions in the case for the reason that under said decision, if the order of the Commission was erroneous in one respect it must necessarily be set aside. The order and judgment of the Circuit Court appear in the Record at pages 203-204. In its opinion in the instant case (R. 238) the Supreme Court of the State of Illinois reiterated and reaffirmed the procedural law as found by the Circuit Court. After making such findings, the Circuit Court ordered and adjudged that the said order and decision of the Illinois Commerce Commission in said cause be and the same was reversed and set aside. Appellees in this proceeding then duly perfected an appeal from the order and judgment of the Circuit Court to the Supreme Court of the State of Illinois, which Court, on March 16, 1942, handed down an opinion reversing the order and judgment of the Circuit Court and remanding the cause to the Circuit Court, with directions to enter an order confirming the order of the Illinois Commerce Commission (R. 249).

The Supreme Court of Illinois, on May 12, 1942, denied without opinion appellant's petition for rehearing.

Appellant was allowed and duly perfected an appeal to this Court, and this Court has noted probable jurisdiction of this cause on appeal.

The Supreme Court of Illinois passed not only upon the one question decided by the Circuit Court, but, as it had a right to do under the decision in *People v. Bradford*, 372 Ill. 63, l. c. 65-66, passed on all of the other questions involved in the case.

Later, under appropriate headings, we shall consider more in detail the opinion of the Supreme Court of Illinois.

Appellant is a railroad corporation, engaged wholly as a terminal and switching carrier engaged in yard operations, and its freight trains do not run on any regular schedule such as those of trunk lines do (R. 212). In

Illinois it has three large yards, each of which consists of a number of tracks ranging in capacity from ten to seventy cars each, and with a very large number of tracks in each yard (R. 6). In each of these yards during each eight-hour period during the entire twenty-four hour day, there are many switch crews engaged in breaking up and making up trains and in transporting such trains when made up either to one of the other yards in Illinois or to the yards of trunk lines in Illinois or to one of the four or five yards of appellant in Missouri (R. 6-7). In addition, appellant makes transfer deliveries to certain other railroad yards of trunk lines in Illinois (R. 7).

Two railroad bridges operated by appellant span the Mississippi River, joining the East St. Louis district with St. Louis, Missouri, the bridges being known as the Eads Bridge and the Merchants Bridge. There are only two railroad tracks on each of the bridges (R. 75-237). As to all of the bridge runs, obviously nothing is transported except in interstate commerce (R. 76). On the transfer runs between the yards of appellant in Illinois and between these yards and other trunk line yards in Illinois, 98% of the merchandise transported is carried in interstate commerce (R. 80). About 68 passenger trains cross the Eads Bridge every day and in the early part of the week about the same number of freight trains cross that bridge each day, while in the latter part of the week the number of freight trains exceeds the number of passenger trains (R. 76). Approximately the same number of trains cross the Merchants Bridge every day (R. 217). These train movements at the time of the trial aggregated about 136 trains on each bridge each day, or an average of a train each ten minutes on each bridge. We think the Court will take judicial notice that at such a large gateway these train movements have greatly increased, due to large movements of troops and war materials.

As appellant's witness Davis said, and his testimony is undisputed (R. 76):

> "It would not be possible to cut a caboose in the middle of the river. We have no place to do it. Two trains would tie up the main tracks. The only practical way of doing that would be to start in Missouri on a movement to Illinois to our yard and bring the caboose the whole way or from Illinois to Missouri of taking it to Missouri. The same situation would apply to the Merchants Bridge."

At the west end of the Eads Bridge the tracks enter a tunnel which runs for about one mile under the City of St. Louis (R. 77). There are only two railroad tracks on each of the two bridges and likewise only two tracks through the tunnel. If cabooses were required on these bridge runs, it would be necessary on both bridges on runs to Missouri to attach the caboose in the yards in Illinois where the cut is made up and carry the caboose across the bridge (and when moving over the Eads Bridge, through the tunnel) into Missouri to the yards that the cut is destined to; and on runs from Missouri to Illinois it would be necessary likewise as to both bridges to attach the caboose in the yards in Missouri (and when moving over the Eads Bridge, ran through the tunnel in Missouri), across the bridge and carry it to the yards in Illinois (R. 76). In other words, the order itself, although on its face limiting the provisions from and to the State line—the middle of the river—as a practical proposition requires cabooses, both coming into and going from Illinois, to be carried in Missouri between the middle of the river and a yard in Missouri (R. 76).

The only practical way to comply with the Commission's order would be to start in Missouri on movements to Illinois at the yards in Missouri and bring the caboose the whole way to the yards in Illinois; and on a movement from Illinois to Missouri to attach the caboose in

the yards in Illinois and take it to the yards in Missouri. This situation applies to both bridges (R. 76).

Furthermore, R. B. Thomas, Chief Railroad Inspector for the Commission, who testified as a so-called Commission witness, corroborated the testimony of appellant's witnesses upon these points. Thomas stated (R. 98), "All these runs over these two bridges either come from the State of Missouri to Illinois or go from the State of Illinois to the State of Missouri." Thomas further stated (R. 99), "As a practical proposition, to put cabooses on those runs across the river would require them to be hauled on over to St. Louis on runs from Illinois and put on the train on the runs in Missouri to bring them into Illinois, from the observation I made on the bridge, as I did not see any places cabooses could be set out in Illinois. If a caboose was taken to the middle of the river on either of these bridges, either westbound or eastbound, as a practical railroading proposition it would be necessary to take them on to the other side of the river."

Furthermore, the Illinois Supreme Court in its opinion (R. 238) said: "Though the Commission's order applies only to cuts of cars moving within the state, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river."

Furthermore, the Supreme Court of Illinois in its opinion (R. 242) said: "As to finding No. 33, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that, since there are no means of leaving a caboose at the State line, where it could be picked up on return, the only practical way in which compliance with the order of the Commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within

the State. This, appellee contends, is, in practical effect, a regulation of the movements of the appellee's trains in the State of Missouri, which is beyond the power of this State or its Commission."

Furthermore (R. 246), the Supreme Court of Illinois in its opinion, in referring to our contentions, said: "They point out that if cabooses are required on these interstate switching runs, appellee will necessarily have to transport them for some distance in Missouri, and Missouri could enact conflicting regulations."

Furthermore, in its opinion (R. 246), the Supreme Court of Illinois said: "Does the fact, if such be a fact, that the only practical method of complying with the order would be to haul these cabooses into Missouri of itself render the order of the Commission invalid as a direct burden upon interstate commerce?"

Obviously, a caboose could not with this traffic be left on the other main track at the state line on movements to Missouri and remain there until picked up by a train coming from Missouri to Illinois.

There was some dispute as to whether or not there were any crossovers on the bridge so that this could be done as an actual movement. The Commission's inspector, Thomas (R. 100), testified that there were no crossovers from one track to another on the Merchants Bridge in Illinois, but that there were perhaps two crossovers on the approach to the Eads Bridge in Illinois. Another witness, Jenkins (R. 21), testified that there was a crossover on the Merchants Bridge about 700 feet from the water line in Illinois, so that trains could be transferred from one track to another when necessary, and that there was a like crossover on the Eads Bridge, but he was not certain whether that was in the State of Illinois or not. He further testified (R. 21) that it would be possible to put crossovers on these bridges in the State of Illinois. Appellant concedes that it would be possible to do so, but

contends that the undisputed evidence shows that with the hundreds of trains running every day over these bridges, with only two main tracks on each bridge, and only two main tracks in the tunnel, it would be impossible to cut a caboose from one main track to another main track and leave it on the other main track until it was next used, even though crossovers existed, and that such a practice in itself would directly hinder, obstruct and impede interstate commerce.

The furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellant and its switchmen, and cabooses have always been since 1910 and are being furnished by reason of written contracts between the Brotherhoods and appellant (R. 82).

Cabooses were furnished by agreement with the Brotherhoods under written contract. On this question the record is clear (R. 79, 81-82). In 1910 three cabooses were furnished by agreement (R. 81), and these were gradually increased by further agreements with the Brotherhoods until at the time of the trial thirty-one cabooses were in use. In each instance these agreements were made with the men through their Brotherhood representatives, and the current agreement between appellant and the Brotherhoods as to cabooses is shown in the record in full (R. 82); and it clearly recognizes the matter of furnishing of cabooses to be a working condition and always treated as such.

The undisputed evidence in the record (and in its opinion the Supreme Court of the State of Illinois so found) shows that all merchandise carried over the two bridges on the bridge runs, covered by Finding 35, was being transported in interstate commerce; that 98% of the merchandise carried in the inter-yard runs in Illinois, covered by Finding 35, was being transported in interstate commerce; that on bridge runs cabooses cannot be attached or dis-

connected at the State line, which is the middle of the river, but that as a practical proposition on both east-west and west-east movements, the necessary effect of the order is to require appellant on east-west movements, after they cross the State line, to carry the caboose across the river (and when using the Eads Bridge, through the tunnel a mile in length), and a considerable distance further to a yard in Missouri; and that likewise, on west-east movements, in order to comply with the order, after the State line is crossed, the caboose must be attached in the yards in Missouri (and when using the Eads Bridge, carried through the same tunnel in Missouri) and half way across the bridge to the State line in order that cabooses may be on the runs while they are in the State of Illinois. In other words, the order of the Commission not only directly impedes, hinders and delays interstate commerce, but also from a practical standpoint requires compliance in Missouri, where the Illinois Commerce Commission had and has no power, jurisdiction or authority.

Appellant's testimony (R. 81, 111, 115) shows that there would be a 40-minutes delay on each round trip if cabooses were put on these runs, and (R. 119) an added delay if cabooses were placed on the runs to the Pennsylvania Railroad, where the delay (R. 119-120) would be from 50 minutes to an hour. This added cost by using the cabooses would amount to $10.00 per run (R. 81), based upon an average 40 minutes delay on each run. This, according to appellant's testimony (R. 81), would entail a cost to appellant for the first year of $400,000, divided $150,000 for new cabooses and $250,000 on account of added expenses due to delay in switching, and after the first year would entail added expense of $250,000 per year (R. 82).

It was further shown that the value of a switch engine, including use of engine, fuel and the wages of the train crew, is computed at $100.00 for each eight hours of use (R. 81). The Commission's inspector, Thomas, testified

(R. 88 and 219) that in the 20s, when he worked for the Illinois Central, the charge for an engine and crew was $75.00 for an eight-hour day, and he would not be surprised if this was now increased to $100.00 per day.

Appellant's Exhibit 36 (R. 231) shows a large number of these movements on a typical day, and fully substantiates appellant's contention as to the cost. The evidence showed that 50 additional cabooses would be needed (R. 112) in addition to the 31 cabooses now in use. Appellee's testimony showed that the delay would average eleven minutes per run; that the initial cost of new cabooses would be $44,000 and the extra annual expense in wages about $62,000, but this estimate would not include anything except wages. Inspector Thomas' testimony was based on certain tests, of which advance information had been given to everyone concerned in the yard (R. 111). It was a "show run" and was given preference over everything, where, regularly, they would have to take the cars, get the caboose when they could and get out when they could (R. 111). The evidence further showed that in actual practice the delays would be many times greater than shown by the test runs (R. 111). Furthermore, Inspector Thomas' figures as to original cost refer only to shelter cars and not to caboose cars, which are the kind of cars required to be furnished under the order of the Commission. This dispute as to the cost is more or less immaterial because the Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (R. 242).

The undisputed evidence showed that if cabooses were attached to these runs, the caboose would be used only by one employe out of five on each run, and by that employe for only from one-sixth to one-eighth of the time that he worked, and during the balance of his working period he would be exposed to the same hazards and, in fact, additional hazards. This statement is verified by the undisputed testimony of Witness Davis (R. 221) to the effect

that the caboose would only be available for the use of the rear switchman, who could only ride it when it moved between one yard and another, and the other testimony to the same effect (R. 110). The balance of the time the rear switchman would be engaged in switching cars, coupling or uncoupling the same, making or breaking up trains, flagging crossings and doing other work incident to switching. The statement that the one rear switchman would only use a caboose for from one-sixth to one-eighth of his working time is based upon the exhibits showing the time between yards and connections and the number of movements of the various crews (R. 224 to 228).

The rear switchman could only use a caboose between yards. For example (R. 140), on the run to the Pennsylvania, the rear switchman would spend only eleven minutes in the caboose and the rest of the time he would not be able to use the caboose. The running time between yards (R. 224-226) is from fifteen to thirty minutes, with one exception, and on that run cabooses are furnished.

The distance between yards varies as to the 20 so-called Illinois runs from 6,800 feet to 41,000 feet; four of these are less than 10,000 feet apart; 10 are from 10,000 to 20,000 feet apart, and six are over 20,000 feet apart (R. 226-227). On some of these longer runs cabooses are furnished the entire year, and on some of them from October 15 to May 15 (R. 81). A rear switchman (R. 82) only uses a lantern by night and a flag by day; he has no other equipment and consequently needs no place to store it (R. 116, 219). The men quit at the same place where they report (R. 110). There are sixteen service stations in the three yards in Illinois at various places, giving ample facilities for storage of street clothes, lunches, etc. (R. 232-233), and there is also a seatbox in the engine for that purpose (R. 110).

Appellant has been losing money for years, the net loss for the seven years before the hearing being over $1,300,

000, or an average yearly loss for the seven years of nearly $200,000 (R. 229). For the first six months of 1938, while the hearing was in progress (R. 229), a loss of over $1,000,000 was sustained, and in July, 1938, when the case was being tried, appellant suffered a loss of over $112,000. The same figures were shown by the income tax reports (R. 228).

In one typical day of 24 hours, there were 29 movements from Cabin No. 1 in CD Yard; 25 movements to and from St. Louis district; 50 movements through Bridge Junction; six movements over the Merchants Bridge; 39 movements in and out of Madison Yard; 21 movements of west side crews into and out of Madison Yard; 71 movements into and out of Wiggins Yards 2 and 5; eight movements from CD Yard to the Pennsylvania; nine to the Alton; 11 to the Wabash, and 10 to the Big Four (R. 231).

From 1928 to 1936 (R. 228) there were eight injuries to employes in cabooses, one on the rear end and seven while riding on cars, showing that in nine years, out of 16 accidents, eight happened to men riding in cabooses, seven while riding on cars and only one while riding on the rear end.

Very few of the lines around St. Louis use cabooses in deliveries to appellant (R. 68). On one of the runs shown by Thomas' testimony, where the test showed a delay of two minutes for the caboose, if there had not been advance notice given and everybody lined up to do a specific move, if it was a regular and ordinary move, it would take from 30 to 40 minutes to get the caboose and put it on the train, get the caboose on the return trip from the I. C., bring it back to the CD Yard and put it away (R. 111). To the same effect is the testimony (R. 137). The delays would average 40 minutes on every delivery made with a caboose out of all of the yards involved (R. 115).

These figures are for a period three or four years ago. With the increased business and necessity of expeditious movement caused by war conditions, the delays and consequent expense to appellant to comply with this order would be vastly more than shown by the record.

The fact that some other railroads in the territory furnish cabooses has no bearing on the questions involved on this appeal.

As to the runs involved in finding 35 (the bridge runs), the questions of delay, expense and extraterritorial effect are involved; while as to the runs involved in finding 34 (the interyard runs), the questions of delay and expense only are involved.

The Supreme Court of Illinois in its opinion (R. 235) substantially found the facts to be as set forth in this statement.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order in question of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz.: the bridge runs; and in holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and determining that the necessary effect of said order as to said runs was not directly to burden interstate commerce by requiring a like compliance in the State of Missouri, where the Illinois Commerce Commission has no power, jurisdiction or authority; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 275).

2. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz.: the bridge runs; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and determining that said order as a practical proposition, created a direct burden on interstate commerce by requiring a like com-

pliance in the State of Missouri, where the Illinois Commerce Commission had no power, jurisdiction or authority; and in not holding, deciding and adjudging that such a burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 276).

3. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz.: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 276).

4. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz.: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and adjudging that such a burden on interstate commerce was

repugnant to the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 276).

5. The Supreme Court of the State of Illinois erred in holding that Congress had not taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to runs mentioned in both Findings 34 and 35; and in holding, deciding and adjudging that the State could legislate in the field even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved, and under such circumstances, in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and was not repugnant to the interstate commerce provisions of said Constitution, contained in Section 8 of Article I thereof (R. 277).

6. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that Congress had taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to all of the runs mentioned in both Findings 34 and 35, and that therefore, inasmuch as Congress had taken charge of the field by appropriate legislation, the State of Illinois could not legislate in that field, even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved; and in not holding, deciding and adjudging that for these reasons the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States, and particularly repugnant to the interstate commerce provisions of said Constitution contained in Section 8 of Article I thereof (R. 277).

7. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission as to all of the transfer runs was not unreasonable because of the exorbitant ex-

pense required in order to comply with it, and in holding that such expense of compliance with the order was not so exorbitant when compared with the benefits accruing therefrom, nor were the said benefits so disproportionate to the cost thereof that the enforcement of the order would not deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto (R. 277).

8. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission as to all of the transfer runs was unreasonable and arbitrary because of the exorbitant expense required in order to comply with it; in not holding that such expense of compliance with the order was not exorbitant when compared with the benefits accruing therefrom and the said benefits so disproportionate to the cost thereof that consequently the enforcement of the order would deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and in not holding, deciding and adjudging, for the reasons set forth in this assignment of errors, that the order of the Illinois Commerce Commission was invalid for the reason that it was repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, by depriving appellant of its property without due process of law (R. 278).

9. The Supreme Court of the State of Illinois erred in holding that the said order of the Illinois Commerce Commission was not repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof (R. 278).

10. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof (R. 278).

11. The Supreme Court of the State of Illinois erred in holding that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, prohibiting a state from depriving a person of his property without due process of law (R. 278).

12. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, for the reason that said order deprives appellant of its property without due process of law (R. 278).

13. The Supreme Court of the State of Illinois erred in reversing the judgment of the Circuit Court of St. Clair County, Illinois, and in remanding the cause to said Circuit Court, with directions to confirm the order of the Illinois Commerce Commission (R. 279).

14. The Supreme Court of the State of Illinois erred in not affirming the order of the Circuit Court of St. Clair County, Illinois (R. 279).

SUMMARY OF ARGUMENT.

I.

The applicable Illinois statutes and decisions under which this case was considered by the Illinois Commerce Commission and by the Supreme Court of the State of Illinois.

II.

The opinion and decision of the Supreme Court of Illinois.

III.

Congress has taken charge of the field, viz., the matter of cabooses, and therefore a state cannot legislate in that field, even though the effect upon interstate commerce is indirect and even though Congress has not legislated as to the particular matters involved.

IV.

The order does directly burden and affect interstate commerce and does have extraterritorial effect and it is, therefore, invalid even though Congress has not taken charge of the field.

V.

The order deprives appellant of its property without due process of law.

VI.

Conclusion and prayer for reversal of the order and judgment of the Supreme Court of the State of Illinois.

ARGUMENT.

The Applicable Illinois Statutes and Decisions.

As was pointed out by the trial court in its order (R. 204), under the authority of *B. of R. T. v. E. J. & E. Ry. Co.*, 374 Ill. 60, which principle was reaffirmed by the Supreme Court in the instant case (R. 238), the power of the courts of Illinois on an appeal from an order of the Illinois Commerce Commission is limited to either affirming such order in its entirety or setting aside in its entirety the order of the Commission. In other words, under the practice in Illinois under these decisions, if the order of the Commission is bad in one respect it must be reversed, even though it may be good in all other respects. For that reason the Circuit Court limited its decision to the one point—that the order of the Commission requiring cabooses to be attached on trains moving between Illinois and Missouri over the two bridges was an interference with interstate commerce and beyond the jurisdiction of the Illinois Commerce Commission. Having found this part of the order invalid, the Circuit Court did not pass on any of the other questions raised, because, under the decisions aforesaid, this required a reversal of the order. However, under the practice in Illinois, and without assignment of error or cross appeal, appellant, who was the appellee in the State Supreme Court, had the right to, if it could, sustain the judgment upon any ground warranted by the record. *People v. Bradford*, 372 Ill. 63, l. c. 65-66. Appellant, as appellee in the court below, availed itself of this privilege and advanced all of the matters now set up in this court, and the Supreme Court of Illinois passed upon all of these questions.

Many other questions were raised in the State Supreme Court by appellant involving matters not properly cognizable on this appeal, and these questions were decided adversely to appellant.

We concede here that if we secure a reversal of this judgment we are limited to the constitutional and federal statutory questions here raised, and we concede further that we are bound by the findings of fact made by the Supreme Court of Illinois in its opinion. However, these findings of fact substantially sustain our factual contentions. It was in spite of these findings of fact sustaining our contentions that the Supreme Court of Illinois, as we contend, misapplied the law.

Appellees claim that the jurisdiction of the Illinois Commerce Commission of the matter involved arises under and by virtue of Sec. 32 (Ill. Rev. Stat. 1941, p. 2503); Sec. 50 (Ill. Rev. Stat. 1941; p. 2508), and Sec. 60 (Ill. Rev. Stat. 1941, p. 2512) of the Illinois Commerce Commission Act. The material parts of these sections are as follows:

"32. • • •

"Every public utility shall furnish, provide and maintain such service instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and public and as shall be in all respects adequate, just and reasonable.

"50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or any two or more public utilities ought reasonably to be made or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new struc-

ture or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost, whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured."

"60. The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

Each commissioner, each assistant commissioner, the secretary of the Commission, and every officer of the Commission designated by it to hold any inquiry, investigation or hearing, shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, compel the attendance and testimony of witnesses, and the production of papers, books, accounts and documents.

Hearings shall be held either by the Commission or by one or more commissioners, or assistant commissioners. All evidence presented at hearings held by the Commission or under its authority shall become a part of the records of the Commission. In all cases in which the Commission bases any action on reports of investigation or inquiries not conducted as hearings, such reports shall be made a part of the records of the Commission."

Appellant has from the outset consistently claimed that no such jurisdiction existed in the Commission because of the provision of Sec. 90 of the Illinois Commerce Commission Act (Ill. Rev. Stat. 1941, p. 2524), which provides as follows:

"90. Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except when specifically so stated, and in so far as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States."

We concede that under the decision of, and as construed by, the Supreme Court of Illinois, the statutes quoted are sufficient to give jurisdiction to the Commission to enter this order, and that under such construction the order is within the power of the Commission, unless, as we contend, it is invalid in some respect, as herein set forth, by being repugnant to the Constitution or laws of the United States.

The Opinion and Decision of the Supreme Court of Illinois.

We do not attempt to detail the opinion of the State Supreme Court, but shall here merely summarize the grounds upon which it reversed the order and judgment of the Circuit Court.

Summing up the conclusions of the Supreme Court of the State of Illinois, the Court decided:

1. That Congress had not taken charge of the field, viz.: the matter of cabooses.

2. That inasmuch as Congress had not taken charge of the field, the State had the right to pass legislation indirectly affecting and constituting an indirect burden on interstate commerce, and that the only limitation of the right of the State was that it could not pass legislation that would result in a direct burden on interstate commerce.

3. That even with the findings as to expense and delays, and with the finding that the effect of the order as to the bridge runs was to require, as a practical proposition, compliance with the order in Missouri, such facts did not constitute a direct burden on interstate commerce, but only indirectly burdened and affected same. This applies to the bridge runs covered by Finding 35.

4. That as to the inter-yard runs in Illinois covered by Finding 34, which contained 98 per cent interstate freight, the extra expense and the delays incident to interstate transportation constituted only an indirect burden on interstate commerce and did not create a direct burden thereon or directly affect the same.

5. That the expense of compliance with the order was not so exorbitant, when compared with the benefits accruing therefrom, and the said benefits were not so dis-

proportionate to the cost thereof, as to deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. That the order, because it is limited to the confines of the State of Illinois, does not purport to regulate interstate commerce, and that its effect must be determined from what it purports to do and not from what actually results.

On the other hand, appellant contends that these conclusions of the State Supreme Court are repugnant to the Constitution and laws of the United States as interpreted by the decisions of this Court. In other words, appellant contends that:

1. Congress has taken charge of the field, viz., the matter of cabooses, and therefore a state cannot legislate in that field, even though the effect upon interstate commerce is indirect and even though Congress has not legislated as to the particular matters involved.

2. Even if Congress has not taken charge of the field, yet a state under such circumstances only has the right to pass legislation indirectly and incidentally affecting interstate commerce.

3. That with the finding as to expense and delays; and with the finding that the effect of the order as to the bridge runs covered by Finding 35 was to require as a practical proposition compliance with the order in Missouri, such facts did constitute a direct burden on interstate commerce and not an indirect and incidental burden thereon.

4. That as to the inter-yard runs in Illinois covered by Finding 34, and which contained 98 per cent interstate freight, the extra expense and delays incident to inter-

state transportation constituted a direct burden on interstate commerce and not an indirect and incidental burden, as found by the State Supreme Court.

5. That the expense of compliance with the order was so exorbitant when compared with the benefits accruing therefrom, and such benefits were so disproportionate to the cost thereof, as to render the entire order invalid in that it deprived appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. That the order, because it is limited to the confines of the State of Illinois, and on its face does not purport to regulate interstate commerce, is not thereby made valid for the reason that the effect of the order must be determined not from what it purports to do but from what actually results from its enforcement.

We shall proceed to discuss these contentions:

Congress Has Taken Charge of the Field, Viz., The Matter of Cabooses, and Therefore a State Cannot Legislate in That Field, Even Though the Effect Upon Interstate Commerce Is Indirect and Even Though Congress Has Not Legislated as to the Particular Matters Involved.

As we understand the law, if Congress has taken charge of the field, a state cannot legislate in that field, even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The question is whether Congress has taken possession of the field, and it is immaterial then whether it has legislated concerning a particular matter within the field. In support of this statement we cite: *Penn. R. R. Co. v. Public Service Com.*, 250 U. S. 566; *Southern Ry. Co. v. R. R. Com. of Ind.*, 236 U. S. 439;

Napier v. Atlantic Coast Line, 272 U. S. 605. To the same effect are: *Staten Island Rapid Transit Co. v. P. S. C.*, 16 F. (2d) 313; *Southern R. Co. v. U. S.*, 222 U. S. 20, 56 L. Ed. 72; *Texas & Pacific R. Co. v. Rigby*, 241 U. S. 33, 60 L. Ed. 874; *Northern Pacific R. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149; *Oregon-Washington R. & N. Co. v. Washington*, 270 U. S. 87, 70 L. Ed. 482; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341, 71 L. Ed. 672; *C. & W. C. R. Co. v. Varnville F. Co.*, 237 U. S. 597, 59 L. Ed. 1137; *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314; *Prigg v. Pennsylvania*, 10 L. Ed. 1060; *Houston v. Moore*, 50 L. Ed. 19, as well as the cases heretofore cited.

In *Penn. R. R. Co. v. Public Service Com.*, 250 U. S. 566, this Supreme Court held that Congress had taken charge of all matters connected with the construction of cabooses and mail cars, and that the states were powerless to legislate. The logical result of this decision is that Congress has taken full jurisdiction of the matter of cabooses, including their construction, equipment, where they shall be placed in the trains, and whether they shall be placed at all on trains. The dissenting opinion of Mr. Justice Clark, l. c. 570, acknowledges this construction of the majority opinion.

The Supreme Court of Illinois in previous decisions had likewise sustained our position upon this point. *Staley v. I. C. R. R. Co.*, 268 Ill. 356; *People v. I. C. R. R. Co.*, 324 Ill. 591; *St. Louis C. R. Co. v. Blumberg*, 325 Ill. 387, and *Gamble-Robinson Co. v. U. P. R. Co.*, 262 Ill. 400.

The above statements as to the law were contained in our printed statement as to the jurisdiction of this Court. Appellees in their brief in support of their motion to dismiss or affirm concede the law to be as above set forth; they concede that if Congress had taken possession of the field, state legislation was invalid, even though it only

indirectly or incidentally burdens interstate commerce; they contend that if Congress had not taken possession of the field and the effect on interstate commerce was only indirect or incidental that then the state might pass and enforce proper police regulations, but that even then such regulations would be invalid if their enforcement directly affects or burdens interstate commerce. It therefore becomes important to determine whether or not Congress has taken possession of the field. If so, even under the decision of the Supreme Court of Illinois the order would be invalid.

In addition, as we have pointed out, the undisputed evidence shows that the furnishing of cabooses is a working condition; that it has always been considered as a working condition and what cabooses were to be furnished has been determined by contract between appellant and the Brotherhood representing its employes. We submit that under these circumstances Congress has taken jurisdiction of the furnishing of cabooses by the passage of the "Railway Labor Act," U. S. C. A., Title 45, Supp. 236 et seq. Sec. 1 (a) of this act (U. S. C. A., Sec. 151 a, Supp., p. 245) provides as follows:

> "The purposes of the chapter are: • • • (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of an agreement covering rates of pay, rules, or working conditions."

Sections 1 and 2 of Section 2 of the Act (Sec. 152, Title 45, Supp., p. 245) provides as follows:

> "First. **Duty of Carriers and Employees to Settle Disputes.** It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the appli-

cation of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

"Second. **Consideration of Disputes by Representatives.** All disputes between a carrier or carriers and its or their representatives shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Par. 6 of Sec. 2 of the Act [Sec. 152 (6), 45 U. S. C. A., Title 45, Supp., p. 246] provides as follows:

"Sixth. **Conference of Representatives; Time; Place; Private Agreements.**

"In case of dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; And provided further, that nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Par. 7 of Sec. 2 of the Act [Sec. 152 (7), U. S. C. A., Title 45, Supp., p. 247] provides as follows:

"Seventh. **Change in Pay, Rules or Working Conditions Contrary to Agreement or to Section 156 Forbidden.**

"No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this chapter."

After providing the machinery for the establishment of adjustment boards and for the settlement of disputes taken under the statutes to such boards, the act provides in Sec. 3 (i) [Sec. 153 (i), U. S. C. A., Title 45, Supp., p. 260] as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Sec. 5 of the Act (Sec. 155, U. S. C. A., Title 45, Supp., p. 268) provides as follows:

"First. **Disputes Within Jurisdiction of Mediation Board.**

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused."

The existing contract between appellant and the Brotherhood (R. 82) contains the following provisions:

Article 22—"(a) Yardmen will be furnished cabooses properly equipped for through long service.

(b) Cabooses will be furnished during all periods of the year to crews on the Central Belt, Falling Springs Branch, Cotton Belt Florida Street merchandise run, and on through trains between Madison Yard and Dupo. Cabooses will be furnished other crews now enjoying them between October 15th and May 1st of each year."

Under these rules it is provided that they "will remain in effect until thirty days' notice shall have been given by either party requesting a change." Consequently, the furnishing of cabooses involves a working condition. Congress has prescribed the way in which such working condition shall be changed. A valid contract is in force and effect as to the furnishing of these cabooses, made between appellant and the Brotherhood, which is an appellee here. Recourse is open to appellee, the Brotherhood, at any time, subject to the provisions of the amended Railway Labor Act for the determination of any changes that should be made in this working condition.

M. P. R. R. Co. v. Norwood, 283 U. S. 249, 252, 253, 256, has been heretofore cited in opposition to our contention that the Railway Labor Act has taken control of the matter of settlement of disputes as to working conditions between a railroad and its employes. This case involved the Arkansas full-crew law. All that this Court held in the Norwood case was that the fact that the Railway Labor Act authorized regulation in respect to the practice of the

carrier in supplying trains to be provided by the carrier did not include the regulation of the number of brakemen or helpers. The decision construed only that language and does not in any way assert that Congress has not given full jurisdiction to the National Railway Labor Board to settle disputes as to working conditions; in fact, the Norwood case supports our contention because it holds that Congress has taken jurisdiction in regard to supplying trains. All that it does hold is that by taking jurisdiction of that matter and placing such jurisdiction in the Labor Board, Congress did not include the number of brakemen or helpers to be furnished.

Sec. 1, Par. (10), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 101), defines car service as follows:

> "(10) 'Car service' defined. The term 'car service' in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter."

Sec. 1, Par. (11), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 102), provides as follows:

> "Sec. 1, Par. (11) Duty to furnish car service; rules and regulations. It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Sec. 1, Par. (12), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 109), takes jurisdiction of the destination of coal cars.

Sec. 1, Par. (13), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 115), provides as follows:

"Sec. 1, Par. (13). Rules and regulations as to car service to be filed, etc. The commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto."

Sec. 1, Par. (14), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 115), provides as follows:

"Sec. 1, Par. (14). Establishment by commission of rules, etc., as to car service. The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices."

Sec. 1, Par. (15), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 116), provides as follows:

"Sec. 1, Par. (15). Powers of commission in case of emergency. Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if so ordered, without answer or other formal pleading by

the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend or annul them. In time of war or threatened war, the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded."

Sec. 1, Par. (16), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 119), permits the Commission to authorize the rerouting of traffic on failure of the initial carrier to serve the public.

Sec. 1, Par. (17), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 120), provides as follows:

"Sec. 1, Par. (17). Directions of Commission as to car service; disobedience; rights of State. The directions of the commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this chapter, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction, such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: Provided, however, That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business; except in so far as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter."

Sec. 1, Par. (21), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 132), in part provides as follows:

"Sec. 1, Par. (21). Power of commission to require adequate facilities or extension of line; penalty. The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car

service as that term is used in this chapter, and to extend its line or lines."

Sec. 26 of the Interstate Commerce Act (U. S. C. A., Title 49, p. 306), in part provides as follows:

> "Sec. 26. Installation of safety devices directed; negligence; penalty. The Commission may, after investigation, order any carrier by railroad subject to this chapter, within a time specified in the order, to install automatic train-stop or train-control devices or other safety devices, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad, such order to be issued and published at least two years before the date specified for its fulfillment."

Sec. 439 of the Transportation Act was inserted in the Interstate Commerce Act as Section 20a (U. S. C. A., Title 49, p. 132), subjecting to the approval of the Interstate Commerce Commission all issues of securities or other evidences of indebtedness or requisites to be found before an approving order can be issued. It is stated in paragraph 2 of the section:

> "The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

This section has been construed by this Court in *Dayton-Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456, 478, and the effect of the enactment was further discussed by this Court in *R. R. Comm. v. Southern Pacific Ry. Co.*, 264 U. S. 331. Furthermore, Congress has taken jurisdiction

of such matters by reason of the passage of the Boiler Inspection Act, 45 U. S. C. A., p. 78, Sec. 22 et seq., and by the Power Brake and other provisions of the Safety Appliance Act, 45 U. S. C. A., Sec. 1 et seq., p. 3 et seq.

As we have pointed out, this Court, in *Penn. R. R. Co. v. Public Service Comm.*, 250 U. S. 566, held that Congress had taken charge of all matters connected with the construction of cabooses and mail cars. On page 569 of the opinion, Mr. Justice Holmes said:

> "The Safety Appliance Act with its careful requirements for the safety of the men was followed by most elaborate regulations issued by the Interstate Commerce Commission which include three large pages of prescriptions for 'caboose cars without platforms.' Caboose cars are constantly used as end cars and these pages, like the Post Office order as to mail cars, recognize the lawfulness of an end car such as the Pennsylvania statute forbids.
>
> "The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case. The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here. The Interstate Commerce Commission is continually on the alert, and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need."

We again call attention to the fact that in Mr. Justice Clark's dissenting opinion, l. c. 570, he held that under the majority opinion it has been held that Congress had taken full jurisdiction of the matter of cabooses, including their construction, equipment, where they shall be placed in trains and whether they shall be placed at all in trains.

While not authoritative here, we call the Court's attention to the very persuasive language of the three-judge court in *A. T. & S. F. Ry. Co. v. La Prade*, 2 Fed. Supp. 855. That case involved the Arizona train limit law, and in a well-considered opinion the court pointed out that by reason of the statutes above cited, with the exception of the Railway Labor Act, which was not mentioned, Congress had taken jurisdiction of the subject matter. The same point was made in *Southern Pac. R. Co. v. R. R. Comm. of Cal.*, 10 Fed. Supp. 918, as to cabooses, but the Court held, l. c. 925, that in view of other holdings in the case it was unnecessary to discuss this point, although two of the members of the court in the *Southern Pacific* case were members of the three-judge court which had already passed on that point in the La Prade case.

It is, therefore, respectfully submitted that by reason of the foregoing legislation, Congress has taken jurisdiction of the field. Consequently, the order of the Illinois Commerce Commission is invalid, whether the effect of its enforcement would be direct or indirect or incidental so far as interstate commerce is concerned. If Congress has taken jurisdiction of the field, then there can be no question but what this order is invalid and repugnant to the Constitution and laws of the United States. The Supreme Court of Illinois recognized this rule, but held that Congress had not taken jurisdiction of the field and that the effect on interstate commerce was not direct but was only indirect and incidental and, therefore, within the police power of the State. The Supreme Court of Illinois was wrong in its decision on this question.

Counsel have heretofore cited the case of *Missouri Pacific R. R. Co. v. Norwood*, 283 U. S. 249, as an authority for their contention that by the provisions of the Interstate Commerce Act, above set forth, Congress has not taken charge of the field, and quote from pages 256 to 258 of the opinion in support of their contention. The language used

in the quotation not only does not support appellees' position, but it supports our position. The opinion clearly shows that this Court did hold that by these provisions of the Interstate Commerce Act Congress had taken possession of the field relative to "supply of trains." All that this Court held was that the fact that Congress had taken charge of the field of the "supply of trains" did not take possession of the field concerning how many men should be employed on a train. In other words, the opinion shows that Congress had taken charge of the field so far as supply of trains is concerned. The number of men that operate these trains is immaterial to the supply of trains, and this opinion supports our position that Congress, by reason of the provisions of the Interstate Commerce Act, has taken charge of the field as to the supply and equipment of trains and whether or not a caboose should be attached to runs of this character.

The definitions of "common carriers," "railroad" and "transportation," as contained in paragraph 3 of Section 1 of the Interstate Commerce Act, U. S. C. A., Sup., Title 49, p. 6, clearly sustain our contention. A "railroad" by that section is defined, among other things, as including all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards and grounds used or necessary in the transportation or delivery of any such property. The term "transportation" is defined as including locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage.

It is immaterial whether the Interstate Commerce Commission has issued regulations as to when cabooses should be used, i. e., "adequate and safe car service," for Congress has taken possession of the entire field and placed the administration of it in the Commission. If a state cannot say what safety provisions shall be made, as held

in the Pennsylvania case, supra, then it cannot require a particular type of car to be placed on the ends of trains, nor can it require any caboose to be used on any interstate runs.

The late cases of *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 86 L. Ed. 322, and *Clover Leaf Butter Co. v. Patterson*, 86 L. Ed 486, also sustain our position on this point.

The Los Angeles depot case, viz., *R. R. Com. v. Southern Pacific;* 264 U. S. 331, does not militate against our position, but, on the contrary, supports our contentions.

Northwestern Bell Telephone Co. v. Nebraska, 297 U. S. 471, merely sustained the right of Nebraska to require telephone companies to use a depreciation rate fixed by the State Commission for the purpose of determining values as to intrastate rates. This Court merely construed the wording of the particular statute involved and held that it did not restrict control until the Interstate Commerce Commission had acted. Furthermore, the part of the opinion quoted applies solely to the use of such a depreciation factor for the determination of rates for intrastate telephone service, and there was no attempt to require such depreciation rate to be used in determining rates for interstate telephone service.

Kelly v. Washington, 302 U. S. 1, limits the right of the states to deal with local exigencies where such conditions exist in the absence of conflict with federal legislation. Neither does this case militate against our contention that if Congress occupies the field, state legislation is prohibited. All that it does hold is that under certain circumstances Congress may by its acts limit the field upon which the legislation operates.

The same answer may be made to the cases of *Eichholz v. Public Service Com. of Mo.*, 306 U. S. 268, and *Welch v. N. H.*, 306 U. S. 79.

We have taken the liberty of discussing these cases in our original brief for the reason that appellees in their motion to dismiss or affirm have cited them as authority for their position.

The Order Does Directly Burden and Affect Interstate Commerce, and Does Have Extraterritorial Effect and Is Therefore Invalid, Even Though Congress Has Not Taken Charge of the Field.

Under this heading we shall discuss the question of whether or not the order directly burdened and affected interstate commerce and has an extraterritorial effect.

Again we call the Court's attention to the two parts of this order, one covered by Finding 34 of the Commission, relative to the inter-yard runs in Illinois, containing 98% of interstate freight, and the other runs covered by Finding 35, which relates to the bridge runs over the Eads and Merchants Bridges between Illinois and Missouri, and which obviously were 100% interstate in character.

The burden on interstate commerce, so far as the inter-yard runs in Illinois are concerned, consists of the delays and added expense in the moving of this interstate traffic which we have detailed in our statement. These same burdens exist as to the bridge runs, with the addition that as we have pointed out the practical observance of the order as to the bridge runs requires cabooses to be attached to the runs in Missouri for a distance of several miles, both in going from Illinois to Missouri and in coming from Missouri to Illinois. These facts are undisputed and are recognized and found by the Supreme Court of Illinois in its opinion.

We conceive it to be the law, and the Supreme Court of Illinois so recognized the fact, that if a state enactment imposes a direct burden on interstate commerce it must fall regardless of whether or not Congress has legislated on the subject. The Supreme Court of Illinois recognized this

rule of law, but it held that Congress had not legislated on the subject and that the burdens and effects on interstate commerce by reason of the enforcement of the order would only be indirect and incidental and not directly burden and affect the same. The point of our objection, and it is sustained by many decisions of this Court, is that the state, by this order, has directly restricted that which in the absence of federal regulation should be free. In other words, if Congress has taken possession of the field, the state cannot regulate at all, but even if Congress has not taken possession of the field, a state cannot legislate if its enactment imposes a direct burden on interstate commerce.

Minnesota Rate Cases, 230 U. S. 352-396;
Lemke v. Farmers' Grain Co., 258 U. S. 50;
Shafer v. Farmers' Grain Co., 268 U. S. 189;
Buck v. Kuykendall, 267 U. S. 307;
C. B. & Q. R. Co. v. R. R. Com., 237 U. S. 220;
K. C. Ry. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75;
U. S. v. Southern Ry. Co., 222 U. S. 20;
Southern Ry. Co. v. R. R. Com. of Ind., 236 U. S. 439;
South Covington & Cincinnati Ry. Co. v. Covington, 235 U. S. 537.

We, of course, do not concede that Congress has not occupied the field—in fact, we strenuously contend that it has. But assuming for the purpose of the argument that Congress has not taken charge of the field, yet we contend that this order does directly burden and affect interstate commerce, and does as a practical proposition as to the bridge runs have an extraterritorial effect, and, therefore, is void, whether Congress has taken possession of the field or not.

In connection with the question of the modern trend of authority concerning the commerce clause of the Constitution, the present state of the law on that subject, and

the distinction between direct and indirect affect on interstate commerce, we call attention to two decisions of this Court under date of November 9, 1942, and not yet officially reported. These cases are: *Wickard, Secretary of Agriculture, etc., v. Filburn*, No. 59, October Term, 1942, reported in 11 L. W. 4011, and *Warren-Bradshaw Drilling Co. v. O. V. Hall etc.*, No. 21, October Term, 1942, and reported in 11 L. W. 4015.

In the *Wickard* case this Court sustained the Agricultural Adjustment Act to apply to wheat not grown for sale, but intended for use or consumption upon the farm on which it was raised, and held such construction to be valid under the commerce clause of the Constitution. The Court in this opinion demonstrated the change in the trend of authority after *United States v. Knight*, 156 U. S. 1, beginning with *Swift & Co. v. United States*, 196 U. S. 375, 398, and continuing in such cases as the *Shreveport Rate Cases*, 234 U. S. 342, and *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119, and quoted from the last-named case as follows:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of power over it, as to make regulation of them appropriate means to the ascertainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

Furthermore, in the *Wickard* case, supra, the Court quoted from its decision in *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 466-467, where Mr. Chief Justice Hughes, speaking for the Court, said:

> "'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.'"

In the *Wickard* case, supra, this Court said:

> "In some cases sustaining the exercise of federal power over intrastate matters the term 'direct' was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with 'substantial' or 'material'; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause."

Under this definition it seems clear that the order complained of in the instant case must be held directly to burden and affect interstate commerce.

In the *Warren-Bradshaw Drilling Co.* case, supra, this Court held that the Federal Wage and Hour Law applies, and with such application was valid, to the members of a drilling crew drilling oil wells, whose employer's contracts with the owners of oil lands part of whose oil will ultimately find its way into interstate commerce, even though the flow in such commerce had not at the time started.

Under these decisions the order here must be held directly to interfere with, hinder and affect interstate commerce, and this is equally true as to the bridge runs con-

taining 100 per cent interstate freight as to the inter-yard runs containing 98 per cent interstate freight. As to all these runs the delay and expense equally result, and as to the bridge runs there is the additional burden and effect as a practical railroading proposition of compelling compliance in Missouri where the Commission is without legal power or authority to legislate.

The leading case in support of our contention is the decision of this Court in *South Covington & Cincinnati St. Ry. Co. v. Covington*, 235 U. S. 537; and this case is on all fours with our case. In that case the City of Covington, Kentucky, passed an ordinance which provided, among other things, that passengers could not ride on the rear platform of street cars, except under certain conditions, nor upon the front platform of street cars unless certain conditions were complied with, and requiring the street car company to keep the cars clean, ventilated and fumigated. The ordinance also had provisions relative to the number of passengers to be carried on a car and the number of cars to be provided, and certain requirements as to the heating of the street cars. The railway company operated a street car line from Covington, Kentucky, across the Ohio River to Cincinnati, Ohio. This Court sustained the provisions relative to passengers riding on the rear and front platforms unless suitable barriers or rails were provided and the requirement to keep the cars clean, ventilated and fumigated, because those provisions of the ordinance could be complied with in Covington without necessarily being complied with in Cincinnati. This Court, however, held invalid that part of the ordinance relative to the number of passengers to be carried on a car and the number of cars to be provided, because such provisions of the ordinance were a burden upon interstate commerce for the reason that, inasmuch as the cars went across the river to Cincinnati, the City of Covington was endeavoring to make regulations which, if enforced in Covington, as a practical proposition,

would necessarily have to be carried out in Cincinnati, a place where the City of Covington had no jurisdiction. This Court did not base its decision upon the question of whether or not federal laws had superseded state laws, but upon the fact that Covington, Kentucky, could not pass an ordinance as to the number of cars to be run across the bridge on the line of the street railway company, or as to the number of passengers to be carried on each car, where such regulation would, as a practical proposition, require the same number and kind of cars to be run or the same maximum number of passengers to be carried on each car, in another state, where the City of Covington had no jurisdiction. On page 545 of the opinion the Court said:

> "This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion. Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce. Texas & New Orleans R. R. v. Sabine Tram Co., 227 U. S. 111; St. Louis, S. F. & T. R. R. v. Seale, 229 U. S. 156; Railroad Commission of Ohio v. Worthington, 225 U. S. 101; Omaha & Council Bluffs Street Ry. v. Interstate Commerce Commission, 230 U. S. 324, 336. A contrary conclusion was reached in this case by the Kentucky Court of Appeals upon the authority of Missouri Pacific R. R. v. Kansas, 216 U. S. 262, but that case concerns an order under authority of the State of Kansas, requiring the running of a passenger train wholly within the state. It was pointed out in the course of the opinion that the order did not deal with an interstate train or put a burden upon such train, but simply required the operation within the state of a local train, the duty of operating such train arising from the charter obligation of the company."

After holding as above stated, this Court then divided the ordinance into two parts, as above mentioned, and held valid that part that could be enforced wholly in Covington, without necessarily being enforced in Cincinnati, but held invalid that part as to the number and kind of cars and the number of passengers to be carried which could not be enforced in Covington without also being enforced in Cincinnati. On pages 547 and 548 of the opinion the Court said:

> "We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply."

Furthermore, the Court held that the ordinance requirement as to minimum temperature to be maintained was unreasonable and void for the reason that the evidence showed it to be impossible and impractical in actual operation.

This makes the Covington case an absolute authority in the present case. The undisputed evidence in the present case shows that if cabooses are required on these interstate bridge runs in Illinois, the appellee will necessarily have to have cabooses for great distances in Missouri. In other words, cabooses cannot be furnished to the state line and then taken off, but as a practical proposition, which this Court said was the test in such matters, the full effect of finding 35 is to require cabooses to be put on in the yards in Missouri and carried a consid-

erable distance in Missouri in order to be on the trains when entering Illinois at the state line; and it further requires cabooses to be carried in Missouri after the state line is passed for a considerable distance to the yard in Missouri before they can be detached from the train. These facts are undisputed and are shown conclusively not only by appellee's witnesses, but also by the testimony of Mr. Thomas, the chief inspector of the Commission, who was called as a Commission witness.

We respectfully submit that the Covington case absolutely disposes of this case and it was on the authority of this case and other cases that Commissioner Olson dissented from the order and decision of the Commission.

In its opinion (R. 246) the Supreme Court of Illinois seemed to think that this Court held certain portions of the ordinance invalid because of certain franchise provisions of the Street Railway Company in Cincinnati. All that this Court held was (l. c. 547) that this was one of the facts to be considered, as appears from the following short quotation from the opinion:

> "To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the Company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the Company, or controlled by it, in that City. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this Company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the State."

Counsel have sought, however, to assert that the Covington case supports their theory, because they say this Court sustained the ordinance provision for barriers or rails on

the rear platform of the car. They misquote the ordinance, as shown by their own quotation from the opinion of this Court. The ordinance provided that no passenger could ride on the rear platform unless it was provided with a suitable rail or barrier. This Court sustained this provision of the ordinance. It did not require a rail or barrier, but only prohibited passengers on the rear platform unless rails or barriers were provided. This could be enforced in Covington and need not be enforced in Cincinnati. When there was no rail or barrier passengers could not ride on the rear platform in Covington, but they could do so when the state line was reached.

On this point we again call the Court's attention to the persuasive language used by the three-judge court in the case of *A. T. & S. F. Ry. Co. v. La Prade*, 2 Fed. Supp. 855, involving the train limit law of Arizona, and to the language appearing on page 859 of the opinion, where the Covington case, supra, is quoted as authority for the opinion of the court.

Southern Pac. R. R. Co. v. R. R. Comm. of Cal. et al. (Brotherhood of Railroad Trainmen et al., Intervenors), reported in 10 Fed. Supp. 918, is another case in point. We realize that this case is not an authority in this Court, but the conditions are so similar and the opinion of the three-judge court so persuasive that we cite it here in support of our position. In that case the California Commission entered an order that the railroad company, between October 1st and March 31st, equip all freight trains in excess of 57 cars, exclusive of rear caboose, operating in both easterly and westerly directions, on that part of its line between Roseville, California, and the California-Nevada state line, with an additional caboose to be placed approximately midway between the rear caboose and the leading engine of the train, and requiring that the railroad company so modify its rules in respect to the duties of trainmen as to permit of the reasonable

and necessary use of caboose cars by members of the train crew. The railroad company, l. c. 919, alleged that the order of the California Commission interfered with and placed an undue burden upon interstate commerce, and therefore violated the commerce clause of the Constitution. The Commission defended its order on the ground that it was a police regulation in the interest of public health and safety, and also contended that the order was not directed at interstate commerce and had no extra-territorial effect because it was limited to the State of California and on its face its provisions became ineffective at the state line between the two states. In order to comply with the order, the railroad would be compelled to build switches at the state line costing $6,700.00, and to delay its trains approximately 30 minutes in order to take off or attach the caboose, as the case might be. The California Commission recognized this fact, but said that such cost and delays could be eliminated by the company carrying the extra caboose about 17 miles to its switch at the division point at Sparks, Nevada, when leaving California, and attaching its caboose at Sparks when the train was entering California. In other words, the Court held that inasmuch as the railroad would be required to acquire at least 15 new caboose cars at a cost of not less than $46,500.00, and that the cost of operations would delay and add to the expense of handling, that therefore the conclusion was inescapable that compliance with the order would necessitate delay and interference with the continuous movement of interstate freight trains. The Court further held that the burden imposed was a direct and substantial burden on interstate commerce and amounted to a direct interference therewith, and that the order was in contravention of the commerce clause of the Constitution.

Other cases supporting our position are: *Lemke v. Farmers' Grain Co.*, 258 U. S. 50; *Shafer v. Farmers'*

Grain Co., 268 U. S. 189; *C. B. & Q. R. R. Co. v. R. R. Comm.*, 237 U. S. 220, and *Colorado v. U. S.*, 271 U. S. 153.

Counsel have cited the case of *C. R. I. & P. R. R. v. Arkansas*, 219 U. S. 453, where this Court sustained the constitutionality of the Arkansas Full Crew Law. Commissioner Olson (Tr. 2-19) in his dissenting opinion conclusively answered the argument of appellees relative to the effect of that case. The law was held constitutional because it operated solely within the boundaries of Arkansas and could be enforced in that state without necessarily being enforced in another state. This Court did not hold that, where as a practical proposition an order or statute, in order to be enforced in Illinois required it also to be followed in another state, then the statute or order would be constitutional. The other cases cited herein clearly answer this argument of appellees and sustain our contention and the position of Commissioner Olson that inasmuch as this order as to the bridge runs cannot be enforced in Illinois without necessarily applying to operations in Missouri, it cannot be sustained. It is obvious in the Arkansas case that when the state line was reached the extra member of the crew could cease work, and that no full crew legislation could require the extra member of the crew to be used in another state where no applicable legislation to that effect existed.

Atlantic Coast Line R. Co. v. Ga., 234 U. S. 290, has also been cited. The statute involved in that case required engines in Georgia to be equipped with electric headlights. The headlights could be operated in the state. It was a statute that could be enforced solely in Georgia without necessarily being applicable in other states, and consequently this Court held it constitutional. Both this case and the Arkansas Full Crew cases (decided in 1911 and 1913 prior to extension of the Interstate Commerce Act and other federal legislation) were decided before the decision of this Court in *South Covington & Cincinnati*

Street Ry. Co. v. Covington, 235 U. S. 537, which latter case is on all fours with our case. If the Atlantic Coast Line case conflicts with the decision in the Covington case, supra, the latter case is not only later, but is based upon a state of facts very similar to the facts in the case at bar; in fact, this Court in the Covington case, supra, quoted the Atlantic Coast Line case, supra, as authority for its holding that the provisions of the Covington ordinance held constitutional only incidentally regulated interstate commerce.

The same answer can be made to the case of *Whitney v. Johnson*, 37 F. Supp. 65, affirmed by this Court in a per curiam opinion in 314 U. S. 574.

Appellees have also cited the recent case of *California v. Thompson*, 313 U. S. 109. This case involved the constitutionality of a California statute requiring every transportation agent for motor vehicles over the state highways to procure a license from the State Railroad Commission, pay a license fee and file a bond. These transportation agents negotiated for the sale of transportation over the public highways of the state. All that this Court held in that case was that, in the absence of pertinent regulation by Congress, the statute requiring a transportation agent to procure a license, pay a fee and file a bond does not violate the commerce clause when applied to one who negotiates for transportation interstate of passengers over state highways where the license is not conditioned on any control or restriction of movement of traffic interstate, but is conditioned only on the good character and responsibility of those engaged locally as transportation brokers. The Court sustained the legislation on the ground that (a) it was not a revenue measure, (b) it did not operate to increase the cost of transportation and (c) its purpose was only to prevent fraud on the public.

There is nothing in the case of *Duckworth v. Arkansas*, 314 U. S. 390, to militate against our contention here. It,

in fact, sustains the power of the state in the regulation of the liquor traffic under the Twenty-first Amendment. We call particular attention to the concurring opinion of Mr. Justice Jackson as pertinent to the facts in this case.

But counsel for appellees say that the requirement of furnishing a caboose for the protection of switchmen has no more direct effect upon interstate commerce than the requirement of the Arkansas Full Crew Law and the requirement of the Georgia Electric Headlight Law. It is obvious that this argument cannot be sustained. Neither the Arkansas nor the Georgia statute required any compliance in any other state. Each of these laws could be enforced in the respective states enacting them without necessarily being enforced as a practical proposition in any other state. The extra member of the crew could be relieved of work the moment the state line was reached as he was leaving the state and could be put to work only when the state line was reached in entering the state. The electric headlight could be used in Georgia and turned on or off, as the case might be, exactly on the state line without delaying or impeding through traffic. The practical operation of neither of these statutes required compliance in any other state. We respectfully call the Court's attention to the cases we have cited in our statement as to jurisdiction upon these points.

The same answer can be and is made to the New York electric headlight statute, held constitutional by this Court in *N. Y. N. H. & H. R. Co. v. New York*, 165 U. S. 628.

Counsel also cite the case of *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262. In that case the order of the State Commission directed the operation of a passenger train between Madison, Kansas, and the state line. This decision was not only before the decision of this Court in the Covington case, supra, but it merely sustained the right of Kansas to require the operation of an intrastate train

within the state, where the duty to operate arose from a charter obligation, and, furthermore, the matter of operation beyond the state line was held to be merely a matter of election on the part of the railroad company and not to be required as a matter of practical operation of the railroad. The order dealt with a **local**, not interstate, train designated to make connections with other railroads within the state.

In distinguishing this case from the Covington this Court so held (p. 545).

It is therefore respectfully submitted that under the decisions herein cited and the facts in this case, the order of the Illinois Commission does directly burden, affect and interfere with interstate commerce and is consequently invalid, even though it may be held that Congress has not legislated on the subject and has not taken charge of the field. This argument applies to both the interyard runs and the bridge runs. As to the interyard runs, the burden and interference consist of the delays and added expense in interstate commerce. As to the bridge runs, this same expense and delay exists, but, in addition thereto, the enforcement of the order as a practical railroading proposition requires the furnishing of cabooses in Missouri, where the Illinois Commission has no jurisdiction. But the Supreme Court of Illinois in its opinion lays great stress upon the fact that the order on its face is limited to the confines of the State of Illinois and does not purport to regulate interstate commerce, and that the effect of the order must be determined by what it purports to do and not from what actually results. Such a conclusion is contrary to the rules of law laid down in *South Covington Ry. Co. v. Covington*, 235 U. S. 537; l. c. 545; *Southern Pac. R. R. Co. v. R. R. Commission*, 10 F. Supp. 918; *A. T. & S. F. Ry. Co. v. La Prade*, 2 F. Supp. 855; *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, and *Shafer v. Farmers' Grain Co.*, 268 U. S. 189. It is also contrary to the decision in *People v. Cross*, 361 Ill. 405.

The Order Deprives Appellant of Its Property Without Due Process of Law.

It is further submitted, and the Supreme Court of Illinois held otherwise, that the benefits accruing by putting this order in effect are so disproportionate to the expense involved, and the cost so exorbitant compared to the benefits, that it constitutes a deprivation of appellant's property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. In support of our position in this respect, we cite: *Colorado v. U. S.*, 271 U. S. 153; *Panhandle Eastern Pipe Line Co. v. State Highway Com.*, 294 U. S. 613; *Penn. Coal Co. v. Mahon*, 260 U. S. 393, to the effect that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"; *Great Northern R. R. Co. v. Minnesota*, 238 U. S. 340, to the effect that any act requiring the expenditure of money upon the part of a railroad company involves the taking of its property, and the question whether this is done with or without due process of law depends upon the special circumstances. We further cited *State of Washington ex rel. Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, and *C. B. & Q. R. R. Co. v. Commerce Com.*, 364 Ill. 213.

The following cases, among many, also support the above rules:

Southern Railway Co. v. Virginia, 290 U. S. 190, 78 L. Ed. 260;

Georgia Power Co. v. Decatur, 281 U. S. 505, 74 L. Ed. 999;

Norfolk & W. Railroad Co. v. P. S. C., 265 U. S. 70, 68 L. Ed. 904;

Chesapeake & Ohio Ry. Co. v. P. S. C., 242 U. S. 603, 61 L. Ed. 520;

Miss. R. R. Com. v. M. & O. R. Co., 244 U. S. 388, 61 L. Ed. 1216;
C. M. & St. P. R. R. v. Wisconsin, 238 U. S. 491, 59 L. Ed. 1423;
C. B. & Q. Ry. v. Wisconsin R. R. Com., 237 U. S. 220, 59 L. Ed. 926;
Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262, 54 L. Ed. 472;
Atlantic Coast Line v. N. Car. Corp. Com., 206 U. S. 1, 51 L. Ed. 933;
Chicago & N. W. Ry. v. Ochs, 249 U. S. 416, 63 L. Ed. 679;
Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194;
C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.

We have further pointed out the effect of the persuasive language of the three-judge court in *Southern Pac. R. R. Co. v. R. R. Comm. of Cal.* (B. of R. T. et al., Intervenors), reported in 10 Fed. Supp. 918, which language is also applicable to this point, because in that case it was held that the small expenditure of $6,700.00 in order to comply with the order of the Commission would deprive the railroad of its property without due process of law if it should incur that expense rather than take the choice of carrying out the order in Nevada, where the California Commission had no jurisdiction. The facts on this question have been clearly set forth in our statement of the case. Whether the delay be eleven minutes or forty minutes per run, the limits fixed by the Supreme Court of Illinois, or whether the cost of supplying new cabooses be $44,000.00 or $250,000.00, and whether the annual expense under normal conditions, to say nothing of present conditions, would be $62,000.00 or $150,000.00, is immaterial in this case.

We have also conclusively shown the very small benefit accruing to one member of each crew by reason of furnish-

ing cabooses, which he would only use from one-sixth to one-eighth of his working time; and the other uses to which the cabooses could be put are fully covered by other facilities furnished by appellant.

We respectfully submit that the expense and delay incident to appellant in order to comply with this order is so exorbitant and unreasonable when compared with the benefit accruing therefrom, and said benefits to this one member of the crew are so disproportionate to the cost thereof to appellant, that to enforce this order would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Of course, there are some hazards when trains are operated without cabooses that do not exist when cabooses are furnished, to the same effect that there are more hazards in operating a train than in not operating it. On this point we again call attention to the undisputed evidence in the record (R. 228) that, even with the bridge runs included, for a long time injuries to employees on the rear end of a train have been far less when no caboose was provided than when one was furnished. This record shows such a slight benefit to the one employee on each run in proportion to the expense involved and delay incident to interstate commerce by reason thereof that it violates the due process of law provisions of the Fourteenth Amendment. This point applies equally to the inter-yard runs and the bridge runs; in fact, under the order of the Commission the expense and delays involve trains in the aggregate for both of the two kinds of runs involved because the order itself requires cabooses on all the runs, and the enforcement of the order of the Commission would require an aggregate expense and delays necessary to comply with the entire order.

CONCLUSION.

As we have pointed out heretofore in this brief, under the Illinois practice the order must be good in all respects or it must be reversed. If we are right on any one of the propositions that we have advanced, then the Illinois practice requires a reversal in this case, because if this Court should hold that we are right on any one proposition and reverse the judgment of the Supreme Court of Illinois on that proposition, then under the Illinois cases previously cited a remandment of the cause to the Supreme Court of Illinois could do nothing except to affirm the decision of the Circuit Court of St. Clair County.

We respectfully submit this case to the Court and ask that the order and judgment of this Court be that the judgment and order of the Supreme Court of the State of Illinois be reversed and the cause remanded to that Court, with directions that it enter such orders as may be consistent with such opinion as this Court may hand down in this case.

All of which is respectfully asked and prayed.

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